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In the Supreme Court of the United States

OCTOBER TERM, 1975

ALFREDO FLORES, a/k/a ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTONIO QUESADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Southern District of Florida, petitioners Flores and Quesada and co-defendant Maritza Brezot were convicted of conspiracy to receive, conceal, buy and sell, and facilitate the transportation, concealment and sale of unlawfully imported heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. Petitioner Quesada was sentenced to six years' imprisonment; petitioner Flores was sentenced to 15 years' imprisonment. The court of appeals affirmed on May 7, 1975 (Flores Pet. App. A). Flores' petition for a writ of certiorari was not filed until July 28, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

The evidence revealed a conspiracy to sell illegally imported heroin and related to two separate transactions, each involving three kilos of contraband. In both instances the drugs were brought into the country by petitioner Flores and sold by Flores and Brezot to Inchaustegui and petitioner Quesada, who in turn sold them to Castrillon and Avalos.

1. Both petitioners contend (Flores Pet. 10-11; Quesada Pet. "B") that the district court erred in refusing to strike the testimony of Felix Olivera, a government witness. On direct examination, Olivera corroborated elements of the testimony of the government's chief witness, Inchaustegui, an unindicted co-conspirator. Upon completion of cross-examination of Olivera by counsel for defendant Brezot, Flores' counsel requested and was granted a short recess. During the recess, the witness talked with the prosecuting attorney. This conversation was observed by defense counsel and was called to the attention of the trial judge outside the presence of the jury. The prosecutor then informed the court that in their discussion, she had told Olivera that he was doing a fine job of testifying and that he was not required to admit to a prior misdemeanor conviction when asked if he had been convicted of any felonies. The trial court admonished the prosecutor for her behavior but denied defendants' motions for a mistrial or to strike the witness's testimony. When cross-examination resumed, defense counsel were permitted to utilize the prosecutor's recapitulation of the conversation as a predicate for questioning Olivera as to his recollection of its contents. At the conclusion of his testimony, the court denied defendants' motion that the testimony be stricken in its entirety.

There is no basis for petitioners' assertion that the prosecutor's conversation with the witness denied them a fair trial. No rule of law or canon of professional be-

havior forbids government counsel from talking with a government witness during a recess. *In re United States,* 286 F. 2d 556, 562 (C.A. 1), reversed on other grounds *sub nom. Fong Foo* v. *United States,* 369 U.S. 141. Absent a showing of deliberate prosecutorial misconduct amounting to subornation of perjury or failure to correct knowingly false testimony, the district court properly denied petitioners' motions.[1]

Petitioner Flores also contends (Flores Pet. 8) without supporting argument that the prosecutor deliberately chose not to bring knowing false testimony by Olivera to the attention of the jury. The witness testified that in his conversation with the prosecutor, he remembered no mention of a "trap" being set for him concerning his prior misdemeanor convictions, although the prosecutor had used that term in recapitulating their conversation for the court. Defense counsel were aware that his testimony differed in this particular from the prosecutor's version of the conversation and thus had full opportunity for cross-examination on the point. Under the circumstances, it can hardly be said that the prosecutor failed to expose false testimony. Furthermore, no implication of knowing falsity arises from the differing recollections of the phrasing of the conversation; since the matter was one as to which the witness had no motive to lie, it seems certain that nothing more than a difference in recollection was involved. Finally, the precise wording of the warning

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[1]Upon becoming aware of the possible impropriety of her action, the prosecutor immediately conveyed her recollection of the substance of the conversation to defense counsel. Counsel were at liberty to use both the existence of the contact and the knowledge thus obtained to attack Olivera's credibility before the jury. Counsel for petitioner Flores cross-examined the witness at some length concerning the subjects covered in the conversation. The remedial measures adopted by the district court therefore prevented any prejudice from befalling the petitioners, so that, in any event, the prosecutor's conduct cannot constitute reversible error. See *United States* v. *Burke,* 495 F.2d 1226 (C.A. 5).

to a corroborative witness to distinguish between his past misdemeanor and felony convictions is wholly immaterial to the issue of petitioner's guilt or innocence. Under the foregoing circumstances, *Giglio* v. *United States,* 405 U.S. 150, is entirely inapplicable.

2. Petitioner Quesada contends (Quesada Pet. "A") that his conviction should be reversed because there was insufficient evidence that the substance involved in the conspiratorial transactions was in fact heroin. The product never came into the possession of the government; introduction of a chemical analysis at trial was therefore impossible. But the prosecution can establish that the substance sold was heroin without introducing the contraband when other reliable evidence is proferred which establishes its nature. *United States* v. *Graham,* 464 F. 2d 1073 (C.A. 5). Lacking the physical evidence, the prosecution can prove this element of the crime by circumstantial evidence. *United States* v. *Jones,* 480 F. 2d 954 (C.A. 5). Petitioner's contention would improperly limit the government's enforcement efforts to those instances in which the drug distributors were arrested while in possession of the contraband.

As summarized by the court below (Flores Pet. App. 5-6), sufficient circumstantial evidence was introduced to establish beyond a reasonable doubt that the substance sold by the defendants was heroin. See *Glasser* v. *United States,* 315 U.S. 60, 80. Petitioner's argument (Quesada Pet. 1) that the ruling below is in direct conflict with the decision in *United States* v. *Graham, supra,* is therefore inaccurate.

3. Petitioner Quesada contends (Quesada Pet. "C") that Inchaustegui, the chief prosecution witness, committed perjury during the trial of this matter. This issue was not presented to the court of appeals, and petitioner states that his purpose in raising it here for the first time is to protect his rights in a future *habeas corpus* proceeding. Such factual disputes are not properly raised in a petition for certiorari. This argument should be directed to the district court in a motion for a new trial based upon newly discovered evidence.

4. Petitioner Quesada next contends (Quesada Pet. "D") that the court erred in admitting against him certain statements made by Castrillon and Avalos. He claims that those statements concerned a separate conspiracy and could not properly be admitted in his trial. He further asserts that the testimony went beyond the overt acts pleaded in the indictment and constituted a variance between the indictment and the proof of the conspiracy.

The evidence introduced at trial showed that Castrillon and Avalos made a purchase of heroin from Quesada and Inchaustegui in the course of the conspiracy charged to Quesada and his co-defendants. This transaction became the basis for a separate indictment against Castrillon and Avalos. But the evidence also showed that Avalos and Castrillon were actively engaged as co-conspirators in the Quesada heroin marketing conspiracy, although they were not so named in that indictment. Their statements therefore were admissible against Quesada.

The sale of heroin to Avalos and Castrillon was not alleged in the indictment as an overt act of the Quesada conspiracy, but the government is not limited to the overt acts pleaded in demonstrating a conspiracy. It may prove other acts of the conspirators occurring during the course of the conspiracy. *United States* v. *Perez,* 489 F. 2d 51, 70 (C.A. 5). As the court below properly found (Flores Pet. App. 7-8), the separate indictment and trial of Avalos and Castrillon did not demonstrate that they were unavailable to Quesada as witnesses.

5. Petitioner Flores, a foreign national, contends (Flores Pet. 9-10) that the methods by which he was detained in a foreign country and transported to the United States constituted a denial of due process of law and the protection of the Fourth Amendment, thereby depriving the district court of personal jurisdiction over him. Petitioner contends that he was forcibly abducted from Venezuela by United

States and foreign agents and thereafter brought to this country in order to stand trial. Flores asserts (Flores Pet. 6) that he was detained by Venezuelan authorities as he was about to board a flight to another country. He was subsequently placed aboard the aircraft which brought him into the jurisdiction of the United States by three Venezuelan police officers and a federal agent. One of the Venezuelan officers and the agent accompanied him on the flight to Puerto Rico, where he was arrested. According to his own account, petitioner was compelled to leave Venezuela against his will by agents of that government. His forcible expulsion cannot be styled a kidnapping absent any evidence showing that these agents acted without authorization from their government. On its face, Flores' detention required the active cooperation and assistance of the Venezuelan government.

Even if Flores' involuntary departure were considered kidnapping, the conditions of his abduction would not deprive the court of personal jurisdiction over him. It is well-settled that the manner in which a defendant is brought within the court's jurisdiction does not require the court to divest itself of jurisdiction over him, except in the most extreme and outrageous circumstances. As this Court said in *Frisbie* v. *Collins,* 342 U.S. 519, 522 (footnote omitted):

> [T]he power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." * * * [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.

One case has suggested that this rule would be relaxed upon detection of a pattern of governmental complicity in the cruel, brutal and inhuman treatment of a defendant by foreign agents. *United States* v. *Toscanino,* 500 F. 2d 267 (C.A. 2). But nothing in the instant case has shown the outrageous conduct by law enforcement officials which would be necessary to bar the government from prosecuting Flores on due process grounds. *United States ex rel. Lujan* v. *Gengler,* 510 F. 2d 62 (C.A. 2). Rather, the allegations of the petition demonstrate that Flores was not subjected to treatment harsher than that incident to any custodial detention.

The decision of the court of appeals on this point does not conflict with the decision of any other court of appeals and presents no issue warranting review by this Court.

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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